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## MEWAH-OILS SDN BHD v. LUSHING TRADERS PTE LTD

COURT OF APPEAL, PUTRAJAYA
DAVID WONG DAK WAH JCA
MARY LIM JCA
HARMINDAR SINGH DHALIWAL JCA

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[CIVIL APPEAL NO: B-02-721-05-2015]
14 FEBRUARY 2017

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***TORT:*** *Conversion – Damages – Claim for – Shipment of crude palm oil without cargo owner's knowledge or consent – Actual owner of cargo of crude palm oil carried by vessel – Right to immediate possession of cargo carried on board of vessel and/or held under original bill of lading – Whether crude palm oil wrongfully received, handled, stored and dealt with – Whether there was conversion*

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***CIVIL PROCEDURE:*** *Res judicata – Claim for tort of conversion – Multiple tortfeasors – Claimant commenced civil suit for damages in Singapore High Court – Final judgment in default of appearance entered – Whether claimant barred from instituting claim of same basis in Malaysia – Whether fact that there were two actions for conversion of same goods against different entities fatal – Whether principles of merger and res judicata applied*

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The respondent ('the plaintiff') purchased 4,999.850 metric ton of crude palm oil ('CPO') from Kantor Pemasaran Bersama ('KPB') in Indonesia. The plaintiff then entered into an agreement to sell the CPO to Summerwind Trading Pte Ltd ('Summerwind') for USD1,917,965.75. Pursuant to the agreement, the CPO was to be delivered to Bangladesh. Summerwind did not make any payment for the CPO. The CPO cargo was loaded on board of 'Suppavan 1' ('the vessel') at Indonesia and was discharged at Port Klang, Malaysia instead of Bangladesh. The owner of the vessel had discharged and delivered the CPO into the defendant's shore tanks at Port Klang. It turned out that pursuant to sale contracts, Mewaholeo Industries Sdn Bhd ('Mewaholeo'), a sister company of the appellant ('the defendant'), had purchased the CPO from Summerwind and the defendant, in turn, purchased the same from Mewaholeo. According to the plaintiff, in receiving the plaintiff's CPO cargo from the vessel at Port Klang, the defendant failed to ensure that it was receiving the CPO cargo from the owner or person having possessory rights to the cargo. The plaintiff further alleged that the defendant then converted the plaintiff's CPO cargo. This prompted the plaintiff to commence a claim at the High Court against the defendant for the sum of USD1,917,965.75 as damages for conversion. The plaintiff also commenced a civil suit against Summerwind at the Singapore High Court ('the SHC'), claiming for the amount of the CPO which was loaded on board three different vessels including the vessel in the present case. A final judgment in default of appearance was entered against Summerwind. The High Court held

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that (i) the plaintiff had proved, on a balance of probabilities, that it had legal title and right to the immediate possession of the CPO on the date the same was loaded on to the vessel; (ii) the plaintiff made full payment to KPB; (iii) the retention of the original bill of lading was the clearest proof of title to the CPO that was discharged into the defendant's shore tanks at Port Klang; (iv) the defendant's acts of physically receiving the CPO from the vessel and discharging the same into its shore tanks and processing and refining the CPO without the consent and knowledge of the plaintiff constituted conversion of the plaintiff's CPO; and (v) the judgment of the SHC was not a bar to the plaintiff bringing the present action against the defendant. Hence the present appeal. The issues that arose for the court's determination were (i) whether the plaintiff was the owner of the cargo of 4,999.850 metric tons of CPO carried by the vessel; (ii) whether the plaintiff had the right to immediate possession of the cargo carried on board of the vessel and/or held under the original bill of lading; (iii) whether the defendant had wrongfully received, handled, stored and dealt with the CPO cargo and subsequently converted the same when they received the same from the vessel; and (iv) whether the plaintiff was estopped from bringing legal action against the defendant as the plaintiff had obtained judgment against Summerwind for the purchase price of the same CPO at the SHC.

**Held (dismissing appeal; affirming order of High Court)**
**Per Harmindar Singh Dhaliwal JCA delivering the judgment of the court:**

**(1)** Since the claim was based on the tort of conversion, the burden was on the plaintiff to prove that the property in the CPO cargo had passed from KPB to the plaintiff such that it was the owner. To prove this, the burden fell on the plaintiff to establish that payment was made by them to KPB. Apart from the oral evidence and the documentary evidence revealed at the trial, there was certainly a strong presumption, which has not been displaced, that when the CPO was loaded onto the vessel, KPB had been paid for the said cargo by the plaintiff. Considering all the circumstances, the plaintiff had, on a balance of probabilities, proved that it had legal title and right to the immediate possession to the CPO cargo. As such, the plaintiff could maintain its suit against the defendants for conversion. (paras 13 & 22)

**(2)** Although payment for the CPO cargo had been made by 8 November 2003, the original bill of lading came into the possession of the plaintiff on 10 November 2003. The discharge of the CPO into the defendant's shore tanks commenced on 9 November 2003 but it was completed on 10 November 2003. The CPO would have been in the possession of the defendant for much longer after that as the defendant then proceeded with processing and refining the CPO. This would certainly be after the plaintiff had possession of the bill of lading. The plaintiff's possession

and continued retention of the original bill of lading was the clearest possible proof of the plaintiff's retention of title to the CPO cargo that was discharged at Port Klang into the defendant's shore tanks. (paras 18 & 20)

**(3)** The defendant contended that they had acted in good faith and, without prior notice or knowledge of any purported rights of the plaintiff, purchased the CPO from Mewaholeo pursuant to sale contracts and made full payment to Mewaholeo which, in turn, purchased the CPO from Summerwind pursuant to sale contracts and made full payment to Summerwind. It was submitted that the defendant obtained good title to the CPO and had not wrongfully received and converted the same. It was futile for the defendant to argue that it had acted under the misapprehension that the cargo belonged to Summerwind. This claim of acting innocently in receiving the cargo was not quite the case as the defendant had accepted a grossly defective bill of lading for the shipment. (paras 23 & 28)

**(4)** The fact that there were two actions for conversion of the same goods against different entities was not fatal. The law recognises separate claims against multiple tortfeasors in conversion. In the instant case, the tort of conversion would have been committed by Summerwind when they sought to deprive the plaintiff of the cargo without making any payment. The defendant would also be liable as they had bought, received, processed and refined the cargo and failed to return it to the plaintiff. These were successive acts and liability would attach independently for their separate roles. The principles of merger and *res judicata* did not apply and the Singapore judgment did not bar the plaintiff's claim against the defendant. (paras 36-38)

***Bahasa Malaysia*** *Headnotes*

Responden ('plaintif') membeli 4,999.850 tan metrik minyak sawit mentah ('MSM') daripada Kantor Pemasaran Bersama ('KPB') di Indonesia. Plaintif memeterai satu perjanjian menjual MSM kepada Summerwind Trading Pte Ltd ('Summerwind') bagi jumlah USD1,917,965.75. Bawah perjanjian ini, MSM hendaklah dihantar ke Bangladesh. Summerwind tidak membuat apa-apa bayaran bagi MSM. Kargo MSM dimuatkan di dalam 'Suppavan 1' ('kapal tersebut') di Indonesia dan diturunkan di Pelabuhan Klang, Malaysia dan bukan Bangladesh. Pemilik kapal tersebut menurunkan dan menghantar MSM ke tangki-tangki darat Pelabuhan Klang. Rupa-rupanya, bawah kontrak-kontrak jualan, Mewaholeo Industries Sdn Bhd ('Mewaholeo'), anak syarikat yang berkongsi syarikat induk dengan perayu ('defendan'), telah membeli MSM daripada Summerwind dan defendan seterusnya membelinya daripada Mewaholeo. Menurut plaintif, dalam menerima kargo MSM

plaintif dari kapal tersebut di Pelabuhan Klang, defendan gagal memastikan defendan menerima kargo MSM daripada pemilik atau orang yang mempunyai hak milikan atas kargo. Plaintif selanjutnya mendakwa defendan seterusnya mengkonversi kargo MSM plaintif. Ini mendorong plaintif memulakan tindakan di Mahkamah Tinggi terhadap defendan bagi jumlah USD1,917,965.75 iaitu ganti rugi konversi. Plaintif memulakan guaman sivil terhadap Summerwind di Mahkamah Tinggi Singapura ('MTS'), menuntut jumlah MSM yang dimuatkan di dalam tiga kapal berasingan termasuk kapal dalam kes ini. Penghakiman ingkar muktamad bagi ketidakhadiran direkodkan terhadap Summerwind. Mahkamah Tinggi memutuskan (i) plaintif berjaya membuktikan, atas imbangan kebarangkalian, plaintif mempunyai hak milik dan hak sah terhadap milikan serta-merta MSM pada tarikh MSM dimuatkan dalam kapal; (ii) plaintif telah membuat bayaran penuh kepada KPB; (iii) penahanan bil muatan asal adalah bukti paling jelas hak milik MSM yang dilepaskan di tangki-tangki darat Pelabuhan Klang; (iv) tindakan defendan menerima MSM secara fizikal daripada kapal dan menurunkan MSM di tangki-tangki darat dan memproses dan menapisnya tanpa kebenaran dan pengetahuan plaintif membentuk konversi MSM plaintif; dan (v) penghakiman MTS tidak menghalang plaintif memulakan tindakan ini terhadap defendan. Maka timbul rayuan ini. Isu-isu berbangkit bagi pertimbangan mahkamah adalah (i) sama ada plaintif pemilik kargo bermuatan 4,999.850 tan metrik MSM yang diangkut oleh kapal tersebut; (ii) sama ada plaintif mempunyai hak milik serta-merta kargo yang dibawa atas kapal dan/atau dipegang bawah bil muatan asal; (iii) sama ada defendan telah, secara salah, menerima, mengendalikan, menyimpan dan berurusan dengan kargo MSM dan seterusnya mengkonversi MSM apabila menerimanya daripada kapal; dan (iv) sama ada plaintif diestop daripada memulakan tindakan undang-undang terhadap defendan kerana plaintif telah memperoleh penghakiman terhadap Summerwind bagi harga belian MSM yang sama di MTS.

**Diputuskan (menolak rayuan; mengesahkan perintah Mahkamah Tinggi) Oleh Harmindar Singh Dhaliwal HMR menyampaikan penghakiman mahkamah:**

**(1)** Oleh kerana tuntutan ini berdasarkan tort konversi, beban dipikul oleh plaintif untuk membuktikan barang dalam kargo MSM tersebut telah diserahkan daripada KPB kepada plaintif, menjadikannya pemilik. Untuk membuktikan ini, beban terletak pada plaintif untuk membuktikan bayaran dibuat oleh mereka kepada KPB. Selain keterangan lisan dan keterangan dokumentari yang didedahkan semasa perbicaraan, sememangnya terdapat anggapan kuat, yang tidak boleh disangkal, bahawa apabila MSM dimuatkan atas kapal, KPB telah dibayar bagi kargo tersebut oleh plaintif. Mempertimbangkan kesemua

hal keadaan, plaintif telah, atas imbangan kebarangkalian, membuktikan mempunyai hak milik dan hak sah terhadap milikan serta-merta kargo MSM. Oleh itu, plaintif boleh meneruskan guaman terhadap defendan-defendan bagi konversi.

**(2)** Walaupun bayaran kargo MSM dibuat pada 8 November 2003, bil muatan asal dimiliki oleh plaintif pada 10 November 2003. Penurunan MSM di tangki darat defendan bermula pada 9 November 2003 tetapi disempurnakan pada 10 November 2003. Minyak sawit mentah tersebut pastinya berada dalam milikan defendan lebih lama selepas itu kerana defendan seterusnya memproses dan menapis MSM. Ini pastinya selepas plaintif memiliki bil muatan. Milikan dan penahanan berterusan bil muatan plaintif adalah bukti paling jelas penahanan hak milik plaintif terhadap kargo MSM yang diturunkan di Pelabuhan Klang ke tangki-tangki darat defendan.

**(3)** Defendan mendakwa bahawa mereka bertindak dengan suci hati dan, tanpa notis atau pengetahuan terdahulu apa-apa dakwaan hak plaintif, membeli MSM tersebut daripada Mewaholeo bawah kontrak-kontrak jualan dan membuat bayaran penuh kepada Mewaholeo yang seterusnya membeli MSM daripada Summerwind bawah kontrak-kontrak jualan dan membuat bayaran penuh kepada Summerwind. Dihujahkan bahawa defendan memperoleh hak milik sah terhadap MSM dan tidak menerima dan mengkonversinya secara salah. Sia-sia sahaja defendan menghujahkan bertindak akibat salah faham bahawa kargo dimiliki oleh Summerwind. Dakwaan bertindak secara tidak bersalah dalam menerima kargo bukanlah seperti yang dilihat kerana defendan telah menerima bil muatan perkapalan yang tersangat cacat.

**(4)** Fakta terdapat dua tindakan konversi bagi dua barangan yang sama terhadap entiti-entiti yang berbeza tidak menjejaskan. Undang-undang mengiktiraf tuntutan berasingan terhadap beberapa pelaku tort dalam konversi. Dalam kes ini, tort konversi mungkin akan dilakukan oleh Summerwind apabila mereka cuba menafikan plaintif akan kargo tersebut tanpa membuat apa-apa bayaran. Defendan juga bertanggungan kerana mereka telah membeli, menerima, memproses dan menapis kargo dan gagal memulangkannya kepada plaintif. Ini adalah tindakan-tindakan yang berturut-turut dan tanggungan adalah berasingan kerana peranan mereka berasingan. Prinsip penggabungan dan *res judicata* tidak terpakai dan penghakiman Singapura tidak menghalang plaintif menuntut terhadap defendan.

**Case(s) referred to:**

*Air Conditioning Systems Design Sdn Bhd v. Chuah Teong Hooi & Anor And Another Appeal [1998] 4 CLJ 741 CA* ***(refd)***

*Enichem Anic SpA and Others v. Ampelos Shipping Co Ltd ("The Delfini") [1990] 1 Lloyd's Rep 252* ***(refd)***

*Leigh & Sillivan Ltd v. Aliakmon Shipping Co Ltd; The Aliakmon [1986] 2 All ER 145* ***(refd)***

*Lushing Traders Pte Ltd v. Mewah-Oils Sdn Bhd [2015] 1 LNS 1217 HC* ***(refd)***
*Marfani & Co Ltd v. Midland Bank Ltd [1968] 1 WLR 956* ***(refd)***
*Mitsui & Co Ltd v. Flota Mercante Grancolombiana SA [1988] 1 WLR 1145* ***(refd)***
*RH Willis & Son v. British Car Auctions Ltd [1978] 1 WLR 438* ***(refd)***
*Rimba Muda Timber Trading v. Lim Kuoh Wee [2006] 3 CLJ 93 FC* ***(refd)***
*Shanti Kant Jhinghan v. Owners Or Other Persons Interested In The Vessel 'Indera Pertama' Of The Port Of Kelang & Anor [1989] 1 CLJ 515; [1989] 2 CLJ (Rep) 457 HC* ***(refd)***
*Syarikat Bekalan Air Selangor Sdn Bhd v. Liew Lai Yin [2010] 5 CLJ 222 HC* ***(refd)***
*United Plastics Sdn Bhd v. Chan Teng Song & Anor [2010] 8 CLJ 120 HC* ***(refd)***

**Legislation referred to:**
Sale of Goods Act 1957, s. 2

**Other source(s) referred to:**
*Clerk & Lindsell on Torts,* 20th edn, paras 17-09, 17-125

*For the appellant - Muhammad Shafee Abdullah, Sara Ann Chay Sue May; M/s Shafee & Co*
*For the respondent - Philip Teoh; M/s Azmi & Assocs*

*[Editor's note: For the High Court judgment, please see Lushing Traders Pte Ltd v. Mewah-Oils Sdn Bhd [2015] 1 LNS 1217 (affirmed).]*

*Reported by Najib Tamby*

## JUDGMENT

**Harmindar Singh Dhaliwal JCA:**

**[1]** This is an appeal against the decision of the High Court at Shah Alam given on 26 March 2015. The High Court had allowed the respondent's claims for the sum of USD1,917,965.75 together with interest for the tort of conversion. Aggrieved with this decision, the appellant appealed to this court.

**[2]** This appeal was heard on 4 July 2016. After hearing the parties and taking into consideration the written submissions, we dismissed the appeal and affirmed the decision of the High Court. Our reasons for doing so now follow. For convenience, the parties will be referred to as they were in the High Court.

**The Relevant Facts**

**[3]** The salient facts giving rise to the civil suit and as well summarised by the learned trial judge can be stated as follows. The plaintiff purchased 4,999,850 metric ton of crude palm oil ("CPO") from Kantor Permasaran Bersama ("KPB") on Free On Board ("FOB") terms in Belawan, Indonesia for USD,874,317.25. The plaintiff then entered into an agreement to sell the CPO to Summerwind Trading Pte Ltd ("Summerwind") for USD1,917,965.75. The CPO under the agreement was to be delivered to Chittagong, Bangladesh. Summerwind did not make any payment for the CPO. The cargo of CPO was loaded on board the vessel called "Suppavan 1" at Belawan,

Indonesia, and was discharged at Port Klang, Malaysia instead of Chittagong, Bangladesh. The vessel owner on 9 November 2003 had discharged and delivered the CPO into the defendant's shore tanks at Port Klang.

**[4]** It turned out that pursuant to sale contracts, Mewaholeo Industries Sdn Bhd ("Mewahholeo"), a sister company of the defendant, had purchased the CPO from Summerwind and the defendant then, in turn, purchased it from Mewahholeo. The plaintiff alleged that in receiving the plaintiff's CPO cargo from the vessel "Suppavan 1" at Port Klang, the defendant failed to ensure that it was receiving the CPO cargo from the owner or person having possessory rights to the cargo. The plaintiff alleged that the defendant had thus converted the plaintiff's CPO cargo. The present civil suit was then filed with the plaintiff claiming for the sum of USD$1,917,965.75 as damages for conversion, interest at 8% per annum from date of conversion and costs.

**[5]** The plaintiff had also commenced a civil suit against Summerwind and its two directors in the High Court at Singapore claiming for the full amount of the CPO which was loaded on board three different vessels including the relevant vessel (Suppavan 1) in the instant case. A final judgment in default of appearance was entered against Summerwind and its directors in 2006 and 2008 respectively.

**At The High Court**

**[6]** At the High Court in Shah Alam, the defendant raised several defences, in particular:

a) that the plaintiff failed on a balance of probabilities to prove that they had actually made payment to KPB and acquired good title of the CPO;

b) that the plaintiff has no '*locus standi*' to maintain this claim against the defendant for conversion as they had no legal right to immediate possession of the CPO under the local bills of lading issued by the vessel owner to KPB;

c) that the defendant in good faith and without prior notice or knowledge of any purported rights of the plaintiff, purchased the CPO from Mewaholeo pursuant to sale contracts and made full payment to Mewaholeo. Mewaholeo, in turn, purchased the CPO from Summerwind pursuant to sale contracts and made full payment to Summerwind. Therefore, at all material times, the defendant obtained good title to the CPO; and

d) that by virtue of the plaintiff taking legal action against Summerwind in the High Court in Singapore for the price of the CPO and not for the CPO itself or title to the same, it has rendered the entire action before this honourable court as misconceived. The judgment obtained by the plaintiff in the High Court in Singapore effectively renders this entire action by the plaintiff against the defendant unsustainable.

**[7]** After a trial, the learned High Court Judge came to the conclusion that the plaintiff had proved their case. The learned judge found that based on the evidence, payment in full had been made by the plaintiff to KPB. It was also found that the retention of the original bills of lading was the clearest proof of title to the CPO that was discharged into the defendant's shore tanks at Port Klang. The plaintiff, in the circumstances, had proved on a balance of probabilities that it had the legal title and right to the immediate possession of the CPO on the date the same was loaded onto the vessel Suppavan 1.

**[8]** It was also held that the defendant's acts of physically receiving the CPO from the vessel Suppavan 1 and discharging the same into its shore tanks and thereafter processing and refining the CPO without the consent and knowledge of the plaintiff, constituted conversion of the plaintiff's CPO. It was further held that the judgment in the Singapore High Court was not a bar to the plaintiff bringing the present action against the defendant bearing in mind that the law recognises separate claims against multiple tortfeasors in conversion (see judgment of High Court as reported – *Lushing Traders Pte Ltd v. Mewah-Oils Sdn Bhd* [2015] 1 LNS 1217; [2016] 6 AMR 616).

**The Instant Appeal**

**[9]** Before us, much of the same arguments were canvassed to establish that the learned judge was in error in coming to her findings. The issues raised in the appeal were firstly, whether the plaintiff was the owner of the cargo of 4,999.850 metric tons of crude palm oil in bulk carried on board the vessel Suppavan 1 under the bills of lading numbers BLW/CTB-01, BLW/CTB-02, BLW/CTB-03, BLW/CTB-04 and BLW/CTB-05, all dated 8 November 2003. The second issue raised was connected to the first; whether the plaintiff had the right to immediate possession of the cargo carried on board the vessel Suppavan 1 and/or held under the original bills of lading.

**[10]** The third issue was whether the defendant had wrongfully received, handled, stored and dealt with the CPO cargo and thereby converted the same when they received the same from the vessel Suppavan 1 at Port Klang into its shore tanks. The final issue was whether the plaintiff is estopped from bringing legal action against the defendant as the plaintiff has obtained judgment against Summerwind for the purchase price of the same CPO in the Singapore High Court.

*First And Second Issues – Whether The Plaintiff Is The Owner Of The CPO And Had The Right To Immediate Possession?*

**[11]** The first two issues, as rightly observed by the learned judge, are inter-connected. It was contended on behalf of the defendant that the plaintiff had not provided any evidence that it had made payment to KPB. Consequently, the plaintiff cannot claim to have ownership or right to possession of the

CPO. Much was made of the fact that KPB persisted to issue an invoice for payment dated 10 November 2003 and bills of exchange dated 10 November 2003 demanding for full payment of the CPO from the plaintiff. This showed that the plaintiff had not made full payment as alleged. The plaintiff had therefore no title and was not the owner of the CPO when the same was delivered to the defendant. In the circumstances, it was submitted that the plaintiff had no *locus standi* to bring this action against the defendant for conversion.

**[12]** It was also submitted that the plaintiff had no right to immediate possession of the CPO as at the time the CPO was discharged into the defendant's shore tanks, the plaintiff did not have the original bills of lading in their possession. On this ground, it was asserted that the High Court order should be set aside.

**[13]** In this regard, we are in agreement with the learned judge that as the claim was based on the tort of conversion, the burden was on the plaintiff to prove that at the material time the property in the CPO cargo had passed from KPB to the plaintiff such that it was the owner. To prove this, the burden fell on the plaintiff to establish that payment had been made by them to KPB.

**[14]** The law in this regard is without controversy and well-established. Both parties, as well as the learned judge, referred to the House of Lords decision in *Leigh & Sillivan Ltd v. Aliakmon Shipping Co Ltd; The Aliakmon* [1986] 2 All ER 145 where it was held that a person who is not the owner of goods at the time that the damage occurred could not sue in tort. This is how Lord Brandon in the leading judgment characterised the legal position (at p. 149):

> … in order to enable a person to claim in negligence for loss caused to him by reason of loss of or damage to property, he must have had either the legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred, and it is not enough for him to have only had contractual rights in relation to such property which have been adversely affected by the loss of or damage to it.

**[15]** In this connection, the learned judge accepted the evidence of PW2, who was a director of the plaintiff and who testified on the shipping procedure. His pertinent evidence was summarised by the learned judge in the judgment as follows:

> 38.1 The shipment of the CPO cargo onto the Suppavan 1 was done on 8.11.2003. The BL at pages 22 to 26 in the common bundle of documents ("CBD") are all dated 8.11.2003. The date 8.11.2003 is the shipment date, ie, the date when the CPO cargo was loaded onto Suppavan 1. The original BL was received in the Jakarta office from KPB on 10.11.2003;

38.2 BL is issued once the goods are on board the vessel. The surveyor's report is integral for the purpose of the creation of the BL. The surveyor's report is in CBD page 41 dated 10.11.2003. Before the surveyor's report is issued, they have a preliminary report which is signed by all parties: the captain representing the ship owner, the surveyor representing Lushing, the buyer or any other parties. Once all the parties agreed to the final figure, they will sign on the preliminary report and the actual report which is the surveyor's report will be done or issued later. The surveyor's report will have the same figures as the preliminary report. The final figures in the preliminary report will be written in the BL. The surveyor's report will have the same figures as the preliminary report;

38.3 The BL clearly identified that our cargo was appropriated and ascertained in the ship's cargo tanks 1P, 1S, 2P, 2S, 3P, 3S, 4P, 4S, 5P and 5S. The surveyors, SUCOFINDO, had also confirmed in their reports (CBD pages 19 to 23) that the CPO cargo totalling 4,999.850 metric tons was loaded from the shore tanks at the load port into the vessel "Suppavan 1" at Belawan on 8.11. 2003. Thus Suppavan 1 loaded and carried the plaintiff's cargo and no other. The defendant's surveyors, SGS (Malaysia) Sdn Bhd ("SGS") had also surveyed the cargo tanks on board Suppavan 1 before and after discharge at Port Klang and recorded that all the plaintiff's CPO cargo had been discharged into the defendant's shore tanks;

38.4 Lushing bought the CPO cargo from KPB for onward sales and not for Lushing's own use. Payment is by irrevocable unrestricted Letter of Credit ("LC") payable by Summerwind. It is common for parties to buy and sell the same cargo a few times in the shipping business. In this case, Lushing had entered into a sale agreement to sell the CPO to Summerwind. The particulars stated in the BL at page 22 CBD states the consignee as Prime Bank Ltd in Agrabad Branch, Chittagong, Bangladesh; notify address at Bay Fishing Co Ltd; the master of the ship is PT Admiral Line, Thai OGA Trading Ltd as owner of the vessel Suppavan 1, Summerwind as charterer of the vessel Suppavan 1 were all inserted at the request of Summerwind who was the buyer and charterer through their LC. It does not matter that Lushing is not named in the BL since Lushing as the holder of the BL is the owner of the CPO cargo and a receiver of the cargo must produce the BL to receive the Cargo;

38.5 Lushing paid KPB and proof of payment can be seen in CBD pages 43 and 44 dated 10.11.2003 which are bills of exchanges cash receipts to the amount of US 1,874,317.25 These documents were prepared by KPB's bank which is Mandiri Bank. Lushing had instructed Kalpataru to make the payment on their behalf. The payment for the CPO was made in advance through their bank as per the invoice at CBD page 42 dated 10.11.2003. Though Lushing paid in advance, it is not reflected or stated in the invoice. The invoice can be given later but KPB will never load the cargo before payment is made.

A 38.6 In the sale of cargo shipped by sea the original BL is a very important document as it is a document which represents the cargo sold. The original BL also gives the right of possession as it allows the holder to collect the cargo at destination. As part of the sale process, the passing of the original BL to the buyer is necessary once payment is made. In this case, the plaintiff had never transferred the original BL to Summerwind
B since Summerwind has never made any payment for the Cargo. Thus, Summerwind has no ownership or possessory rights in the CPO cargo.

**[16]** On the question of when payment was made by the plaintiff, the learned judge referred to the evidence of PW1, who was the Head of Palm Oil Marketing of KPB, and PW3, who was the Chairman and Managing
C Director of the plaintiff. PW1 testified that payment in full had been received by KPB from the plaintiff before the cargo was loaded on board the Suppavan 1 at Belawan Port on 8 November 2003. PW7 also told the court that it was KPB's policy to load a cargo onto a ship only after payment had been received.

D **[17]** The learned judge also appeared to place particular significance on the evidence of PW3 as summarised in the judgment as follows:

42.1 PW3 made advance payment on the CPO cargo of US 732,500.00 on 10.10.2003 and US 770,000.00 on 30.10.2003, totalling US 1,502,500.00. PW3 clarified that the differences in contract quantities and actual loaded
E quantities were due to the nature of cargo of CPO being liquid in bulk. Due to its liquid form, it was extremely difficult to achieve an exact round figure. Thus advance payment were made for certain quantities in round figures;

42.2 The documents at CBD pages 43 and 44 in the sum of US
F 1,874,317.25 are receipts or acknowledgements of payment by KPB (seller) of the CPO cargo sold to Lushing (buyer). Thus, before 8.11.2003, Lushing had already paid for all the CPO cargo;

42.2 Thus, Lushing became the owner of the CPO cargo on board the Suppavan 1 when it was loaded on 8.11.2003 since they have paid for the
G CPO cargo. Lushing received the original BL from KPB on 10. 11.2003 at their Medan office;

42.3 Lushing entered into a contract of sale with Summerwind on the same CPO cargo for USD 1,917,965.75. Terms of payment were by LC. Lushing failed to make payment for the CPO cargo and Lushing did not
H give the original BL to Summerwind;

42.4 Lushing is and was at all times the owner of the CPO cargo and the lawful holder of the BL and is the party entitled to immediate possession of the CPO cargo.

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**[18]** Now although payment for CPO cargo had been made by 8 November 2003, the original bills of lading ("BL") came into the possession of the plaintiff on 10 November 2003. So although the discharge of the CPO into the defendant's shore tanks commenced on 9 November 2003, it was completed on 10 November 2003. Even then the CPO would have been in the possession of the defendant for much longer after that as the defendant then proceeded with processing and refining the CPO into refined deodorised palm olein. This would certainly be well after the plaintiff had possession of the BLs.

**[19]** It is trite law that a bill of lading operates in commercial transactions as a document of title to goods. Section 2 of the Sale of Goods Act 1957 provides that a document of title to goods includes a bill of lading. In a leading case on the subject, the English Court of Appeal decision in *Enichem Anic SpA and Others v. Ampelos Shipping Co Ltd ("The Delfini")* [1990] 1 Lloyd's Rep 252, Lord Justice Mustill depicted the function of a bill of lading as "the key to the warehouse" where His Lordship stated (at p. 268):

> First, as to the status of the bill of lading as a "document of title". I put this expression in quotation marks, because although it is often used in relation to a bill of lading, it does not in this context bear its ordinary meaning. It signifies that in addition to its other characteristics as a receipt for the goods and as evidence of the contract of carriage between shipper and ship-owner, the bill of lading fulfils two distinct functions. 1. It is a symbol of constructive possession of the goods which (unlike many such symbols) can transfer constructive possession by endorsement and transfer; it is a transferable "key to the warehouse". 2. It is a document which, although not itself capable of directly transferring the property in the goods which it represents, merely by endorsement and delivery, nevertheless is capable of being part of the mechanism by which property is passed.

**[20]** In the circumstances, the learned judge was right to conclude that the plaintiff's possession and continued retention of the original BLs was the "clearest possible proof of the plaintiff's retention of title to the CPO cargo that was discharged at Port Klang into the defendant's shore tanks". It must follow that the property in the cargo had passed from KPB to the plaintiff if not at the date of the BL (8 November 2003) then at the latest on 10 November 2003.

**[21]** In any event, it is highly improbable that KPB would have released the CPO cargo to the plaintiff without being paid first. In the English Court of Appeal case of *Mitsui & Co Ltd v. Flota Mercante Grancolombiana SA* [1988] 1 WLR 1145, a case where goods were damaged on board a ship and ownership of the goods became the principal issue, Staughton LJ had occasion to observe (at p. 1153):

It seems to me that in the ordinary way a seller will not wish to part with the property in his goods if they are shipped overseas until he has been paid in full. There is support for that view again in *Benjamin's Sale of Goods*, p. 938, towards the end of para. 1484:

> In overseas sales, there is, therefore, a fairly strong presumption that the seller does not intend to part with property until he has either been paid or been given an adequate assurance of payment. Of course the presumption may be rebutted: for example, by the fact that buyer and seller are associated companies (so that the seller does not need security for payment) or by the fact that the contract expressly provides for credit.

**[22]** Apart from the oral evidence and the documentary evidence revealed at the trial, there is certainly a strong presumption, which has not been displaced, that when the CPO was loaded onto the vessel Suppavan 1, the seller KPB had been paid for the said cargo by the plaintiff. Considering all the circumstances, we agree that the learned judge was entitled to come to a finding that the plaintiff had, on a balance of probabilities, proved that it had legal title and right to the immediate possession to the CPO cargo on 8 November 2003. As such, the plaintiff could maintain its suit against the defendants for conversion.

*Third Issue – Whether The Defendant Had Wrongfully Received And Converted The CPO?*

**[23]** In this connection, the defendant contended that they had acted in good faith and without prior notice or knowledge of any purported rights of the plaintiff, purchased the CPO from Mewaholeo pursuant to sale contracts and made full payment to Mewaholeo. Mewaholeo, in turn, purchased the CPO from Summerwind pursuant to sale contracts and made full payment to Summerwind. It was accordingly submitted that the defendant obtained good title to the CPO and had not wrongfully received and converted the same.

**[24]** With respect, this submission appears to have overlooked settled principles of law regarding the tort of conversion. The authors of *Clerk & Lindsell on Torts*, 20th edn, at para 17-09 characterised conversion in the following fashion:

> Anyone who without authority receives or takes possession of another's goods with the intention of asserting some right or dominion over them, or deals with them in a manner inconsistent with the right of the true owner is *prima facie* guilty of conversion; provided there is an intention on the part of the person dealing with them to negative the right of the true owner or to assert a right inconsistent therewith. A thief, therefore, commits conversion, as does a person purporting to exercise a *lien* he does not have, not to mention a person who buys goods which turn out not to have belonged to the seller and a seller of goods who, having despatched them, wrongfully retakes them from the carrier (even temporarily).

**[25]** It is axiomatic that acting innocently, in good faith, in ignorance or by mistake is generally irrelevant in a claim for conversion. A defendant's liability in conversion will be established irrespective of whether or not he knew or had reason to know that he was asserting rights belonging to the plaintiff. In the oft-quoted case of *Marfani & Co Ltd v. Midland Bank Ltd* [1968] 1 WLR 956, Diplock LJ expressed the position as follows (at pp. 970-971):

> At common law, one's duty to one's neighbour who is the owner, or entitled to possession, of any goods is to refrain from doing any voluntary act in relation to his goods which is a usurpation of his proprietary or possessory rights in them. Subject to some exceptions, it matters not that the doer of the act of usurpation did not know, and could not by the exercise of any reasonable care have known of his neighbour's interest in the goods. This duty is absolute; he acts at his peril.

**[26]** So unless a defendant can invoke some recognised exceptions, which is not the case here, he will be liable even if his actions were reasonable or well-intentioned. This strict approach to liability is well-established in Malaysian law as decided by the Federal Court in *Rimba Muda Timber Trading v. Lim Kuoh Wee* [2006] 3 CLJ 93; [2006] 4 MLJ 505 and followed in *United Plastics Sdn Bhd v. Chan Teng Song & Anor* [2010] 8 CLJ 120 and *Syarikat Bekalan Air Selangor Sdn Bhd v. Liew Lai Yin* [2010] 5 CLJ 222; [2010] 3 MLJ 76.

**[27]** Reverting to the instant case, the learned judge found that the defendant had physically received the cargo from the vessel Suppavan 1 at Port Klang on 9 November 2003. Discharge of the CPO cargo commenced on the same day and was completed on 10 November 2003. Subsequently, the defendant processed and refined the CPO into refined deodorised bleached ("RDB") palm olein. These acts were without the knowledge and consent of the plaintiff as the owner of the CPO cargo. The learned judge was therefore entitled to come to a finding that this constituted conversion of the plaintiff's goods.

**[28]** It is, with respect, futile for the defendant to argue that it had acted under the misapprehension that the cargo belonged to Summerwind. This claim of acting innocently in receiving the cargo, although irrelevant as alluded to earlier, is not quite the case as the defendant had appeared to accept a grossly defective bill of lading for the shipment. Seen as such, the plaintiff's depiction of the defendant acting in a blind and reckless manner in its dealing with Summerwind, is not without merit.

**[29]** It may be useful to remind ourselves that the law jealously guards the rights of the true owner. In the Federal Court case of *Rimba Muda, supra,* Arifin Zakaria FCJ (now CJ) approved of the legal position explained by Lord Denning MR in *RH Willis & Son v. British Car Auctions Ltd* [1978] 1 WLR 438 as follows:

> … the common law has always acted on the maxim *nemo dat quod non habet*. It has protected the property rights of the true owner. It has enforced them strictly as against anyone who deals with goods inconsistently with the dominion of the true owner. Even though the true owner may have been very negligent and the defendant may have acted in complete innocence, nevertheless the common law held him liable in conversion.

*Fourth Issue – Whether The Plaintiff Is Estopped From Bringing Legal Action Against The Defendant As The Plaintiff Has Obtained Judgment Against Summerwind For The Purchase Price Of The Same CPO In The Singapore High Court?*

**[30]** In this regard, the defendant referred to a civil suit filed by the plaintiff in the Johor Bahru High Court against Felda-Johore (Civil Suit No: MT4-11-728-2009) ("JB case") to recover the purchase price of CPO on board the vessel Orapin 3 which formed part of the plaintiff's claim in their civil action against Summerwind and its two directors in the Singapore High Court.

**[31]** In that JB case, the learned High Court Judge came to the following finding in the grounds of judgment dated 13 January 2014:

> [38] The Plaintiff alleged that Summerwind did not make any payment for the CPO cargo and that the Plaintiffs' did not transfer any rights or interest in the cargo to Summerwind. The Plaintiff's argument did not correspond with the facts and evidence before this court. The fact is that the Plaintiff did release the subject matter cargo to Summerwind. The Plaintiff had successfully obtained judgment against Summerwind in the Singapore High Court and that the Plaintiff admitted that Summerwind is the party solely responsible and liable to the Plaintiff for the CPO cargo. The Plaintiff had invoiced Summerwind for the same cargo totalling USD1,532,236.18, the same amount they are claiming against the Defendant in this action. By their action, the Plaintiff admitted that Summerwind has possession and ownership rights in the subject matter cargo, and that the Plaintiff has lost its rights to possession and ownership in the said CPO cargo.

**[32]** The learned judge in the JB case relied on the decision of this court in *Air Conditioning Systems Design Sdn Bhd v. Chuah Teong Hooi & Anor And Another Appeal* [1998] 4 CLJ 741; [1998] 4 MLJ 633 ("*ACS Design*") where the court referred to with approval the High Court judgment which read as follows (at p. 747 (CLJ); pp. 638-639 (MLJ)):

> But what was even more relevant to my mind was the fact that the plaintiff had obtained a final judgment against Avtech on 28 October 1985 (before instituting this action and the related suit) for the price of the same goods in question in suit 22-1282-1985 in the High Court of Malaya at Penang wherein the plaintiff had not claimed for the possession or return of the goods, which was an admission that the property in the goods had in fact passed to Avtech and subsequently to the defendants.

> In the circumstances, I found myself in agreement with counsel for the defendants who submitted that 'the plaintiff would have been aware that having obtained judgment for the price of the goods, all the rights of the plaintiff would have merged in the judgment and it would in fact be too late to pursue a claim for the return of the goods from Avtech, let alone the defendants'.

And later on in the same judgment (at p. 748 (CLJ); p. 639 (MLJ)):

> At the time the plaintiff filed the claim against Avtech and obtained a final judgment for the price of the goods which very goods are the subject-matter of this action and the related suit, it elected not to seek the return of the goods, thereby conceding that the title in them had passed to Avtech. … It therefore follows that neither could the plaintiff raise that cause of action against the defendants in this action and the related suit as all the plaintiff's rights in respect of the goods would have merged in the judgment and the plea of *res judicata* would be available to the defendants.

**[33]** It was accordingly submitted that as the final judgment in the Singapore High Court subsists, where a clear election has been made by the plaintiff to sue Summerwind only for the price of the CPO, the plaintiff, by its own action, has caused all of its rights to merge into the said judgment. The plaintiff has thus lost all its rights to possession and ownership in the CPO and by successfully obtaining judgment against Summerwind, the plaintiff's claim based on conversion in the present appeal should fail.

**[34]** In this context, we note that in the Singapore case, the plaintiff had pursued a claim against Summerwind and its two directors for non-payment of three separate shipments which comprised of the shipments on the vessels Orapin 3, Suppavan 1 and Istana IV. The defendants there did not enter appearance and the plaintiff took judgment in default. The claim included the price/value of the goods for non-payment under the sales contract as well as for conversion of the said goods.

**[35]** Now the plaintiff in the Singapore action had expressly reserved and preserved its rights to the cargo and rights to possession which possessory rights are a pre-requisite to a claim in conversion. The plaintiff had stated that at all material times, they were the owners and the holders of the bills of lading. There was no concession or admission that any title or possessory rights had been relinquished. The facts were therefore quite different from that in the *ACS Design* case.

**[36]** The fact that there were now two actions for conversion of the same goods against different entities is not fatal as the law recognises separate claims against multiple tortfeasors in conversion. In *Clerk & Lindsell on Torts*, 20th edn, at paras. 17-125 it is stated:

A The owner of a chattel who has been deprived of his possession may well have a remedy against more than one person. For example, A may have wrongfully taken it and B may afterwards have bought it, sold it or wrongfully detained it. A and B are here not joint tortfeasors; there is a perfectly independent right of action against each other.

B **[37]** In the instant case, the tort of conversion would have been committed by Summerwind when they sought to deprive the plaintiff of the cargo without making any payment. The defendant would also be liable as they had bought, received, processed and refined the cargo and failed to return it to the plaintiff. These are successive acts and liability will attach independently for their separate roles.

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**[38]** More importantly, no payment had been made by Summerwind. As the learned judge noted, Summerwind has been wound up. We agree with the learned judge that the unrealised judgment of a monetary debt could not erase the defendant's tort of conversion. In any case, it is clear that the possessory D rights had never passed to Summerwind as the original bills of lading always remained with the plaintiff and never passed to Summerwind. This was simply because no payment had been made for the goods. The defendant knew the significance of the bill of lading as a feeble attempt was made to introduce a draft bill of lading into evidence. So unlike the *ACS Design* case, E the instant case was one where possessory rights and title does not pass until full payment is made (see *Shanti Kant Jhinghan v. Owners Or Other Persons Interested In The Vessel 'Indera Pertama' Of The Port Of Kelang & Anor* [1989] 1 CLJ 515; [1989] 2 CLJ (Rep) 457; [1989] 3 MLJ 58). In the circumstances, the principles of merger and *res judicata* do not apply and the Singapore judgment did not bar the plaintiff's claim against the defendant.

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**[39]** The learned judge has to a great extent set out her understanding of the effect of the Singapore judgment to the present suit. We have no quarrel with the reasons provided and fully endorse her findings.

**Conclusion**

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**[40]** In the circumstances, and for the reasons we have given, we were of the view that the appeal was without merit. The appeal was therefore dismissed with costs. The order of the High Court was affirmed. After hearing the parties, we fixed costs at RM20,000 subject to payment of allocator fees. We also ordered the deposit to be refunded to the appellant/ H defendant.

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